Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

JOHN H. BRADBURY,

Petitioner,

v.

IDAHO JUDICIAL COUNCIL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

PETITION FOR A WRIT OF CERTIORARI

JOHN H. BRADBURY, ESQ.
Petitioner, Pro Se
729 Preston Avenue
Lewiston, Idaho 83501
(208) 746-3100

170201

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

A. This Court is asked to decide for the first time whether a state judicial disciplinary hearing may be statutorily closed to the public without any factual showing that closure is required by a government interest so compelling that it overrides the core First Amendment liberty of the public to attend hearings to see how their government works and hold it accountable, as set forth in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) and its progeny.

B. This Court is also asked to decide for the first time whether a lawyer who has a professional and economic interest in assuring an impartial forum for his clients and who is professionally obliged to report judicial misconduct to a judicial review council and which council is in turn required to decide the merits of the complaint, has "individual entitlement grounded in state law" that amounts to a property interest sufficient to grant that lawyer the right to attend the hearing "to present his case and have its merits fairly judged," as required for a chose-in-action at an administrative hearing by this Court in *Logan v. Zimmerman*, 455 U.S. 422, 430, 433 (1982).

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John Bradbury petitions this Court to issue a Writ of Certiorari to the Supreme Court of Idaho to review its decision in this case that was entered on August 1, 2001.

OPINIONS BELOW

The opinion of the Supreme Court of Idaho is reported at __ *Id.* __, 28 P.3d 1006 (2001). Appendix A. The remittitur making the opinion final is appended as Appendix B. The district court decision, Case No. CV OC 99027770, was not published. It is appended as Appendix C.

STATEMENT OF JURISDICTION

A. Basis and Timing

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

This petition is filed within ninety days of the August 1, 2001, the date on which final judgment was entered by the Supreme Court of Idaho. Appendix B.

B. The Constitutional Questions Were Properly Presented.

The statute's repugnance to the Fourteenth Amendment's substantive and due process requirements by the exclusion of the public and the complainant from a judicial disciplinary hearing was presented to the state district court as follows:

The amended complaint for declaratory judgment alleged:

XXXIV.

The exclusion of the public in general and Bradbury in particular from the records and

proceedings of the judicial council violated the substantive due process requirements of the Fourteenth Amendment to the United States Constitution.

XXXV.

The exclusion of Bradbury from the records and proceedings of the council violated Bradbury's constitutional right to procedural due process guaranteed by the Fourteenth Amendment.

The same issues were presented to the Supreme Court of Idaho:

A. Did the exclusion of the complainant from the council proceedings deciding his complaint and the records concerning it deprive him of a fundamental liberty and thereby infringe on his right to substantive due process contrary to the Due Process Clause of the Fourteenth Amendment?

B. Did the exclusion of the complainant from the proceedings deciding his complaint and the records concerning it deprive him of procedural due process contrary to the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

A. The Fourteenth Amendment

The Fourteenth Amendment to the Constitution provides in part:

No state shall make or enforce any law which shall abridge the privileges and immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

B. The First Amendment

The First Amendment to the Constitution provides in part:

> Congress shall make no law . . . respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances. . . .

C. Idaho State Constitution — Impeachment

Idaho State Constitution, art. V, § 3, provides:

> Impeachments — Where and how tried. — The court for the trial of impeachments shall be the senate. A majority of the members elected shall be necessary to a quorum, and the judgment shall not extend beyond removal from, and disqualification to hold office in this state; but the party shall be liable to indictment and punishment according to law.

Idaho State Constitution, art V, § 4, provides:

> Impeachments — Where and how tried — Conviction — Impeachment of governor. — The house of representatives solely shall have the power of impeachment. No person shall be convicted without the concurrence of two-thirds (2/3) of the senators elected. When the governor is impeached, the chief justice shall preside.

D. Idaho State Constitution — Judicial Discipline

Idaho State Constitution, art. V, § 28, provides:

> Removal of judicial officers — Provisions for the retirement, discipline and removal from office of justices and judges shall be as provided by law.

E. The Judicial Council Act

Idaho Session Laws 1967, Ch. 67, p. 153; amended, Idaho Session Laws 1986, Ch. 89, § 3, p. 260 provides:

> SECTION 1. There is hereby created a judicial council which shall consist of seven members. Three attorney members, one of whom shall be a district judge, shall be appointed by the board of commissioners of the Idaho state bar with the consent of the senate. Three non-attorney members shall be appointed by the governor with the consent of the senate. If any of the above appointments be made during a recess of the senate, they shall be subject to consent of the senate at its next session. The term of office for an appointed members of the judicial council shall be six years, except that of the members first appointed, one attorney member and one non-attorney member shall each serve for two years, one attorney member and one non-attorney member shall each serve for four years, and one attorney member and one non-attorney member shall each serve for six years; thereafter appointments shall be made for six year terms. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration for area representation and not

more than three of the appointed members shall be from one political party. The chief justice of the supreme court shall be the seventh member and chairman of the judicial council. No member of the judicial council, except a judge or justice, may hold any other office or position of profit under the United States or the state. The judicial council shall act by concurrence of four or more members and according to the rules which it adopts.

SECTION 2. The judicial council shall:

(1) Conduct studies for the improvement of the administration of justice;

(2) Make reports to the supreme court and legislature at intervals of not more than two years.

(3) Submit to the governor the names of not less that two nor more that four qualified persons for each vacancy in the office of justice of the supreme court or district judge, one of whom shall be appointed by the governor;

(4) Recommend the removal, discipline and retirement of judicial officers; and,

(5) Such other duties as may be assigned by law.

SECTION 3. A justice of the supreme court or judge of any district court, in accordance with the procedure prescribed in this section, may be disciplined or removed for willful misconduct in office or willful and persistent failure to perform

his duties or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties, which is, or is likely to become of a permanent character. The judicial council may, after such investigation as the council deems necessary, order a hearing to be held before it concerning the removal, discipline or retirement of a justice or a judge, or the council may in its discretion request the supreme court to appoint three special masters, who shall be justices or judges, to hear and take evidence in any such matters, and to report their findings to the council. If, after hearing, or after considering the record and the findings and report of the masters, the council finds good cause therefore, it shall recommend to the supreme court the removal, discipline or retirement, as the case may be, of the justice or judge.

The supreme court shall review the record of the proceedings on the law and facts and in its discretion may permit the introduction of additional evidence and shall order removal, discipline or retirement, as it finds just and proper, or wholly reject the recommendation. Upon an order for retirement, the justice or judge shall thereby be retired with the same rights and privileges as if he retired pursuant to other provisions of law. Upon an order for removal, the justice or judge shall thereby be removed from office, and his salary shall cease from the date of such order.

All papers filed with and the proceedings before the judicial council or masters appointed by the Supreme Court, pursuant to this section,

shall be confidential, and provided, however, that if allegations against a judge are made public by the complainant, judge or third persons, the judicial council may, in its discretion, comment on the existence, nature, and status of any investigation. The filing of papers with and the giving of testimony before the council or the masters shall be privileged; but no other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the council in the Supreme Court continues privileged and upon such filing loses its confidential character and (b) a writing which was privileged prior to its filing with the council or the masters does not lose such privilege by such filing. The judicial council shall by rule provide for procedures under this section, including the exercise of requisite process and subpoena powers. A justice or judge who is a member of the council or Supreme Court shall not participate in any proceedings involving his own removal, discipline or retirement.

SECTION 4. Each member of the judicial counsel, except a judge or justice, shall receive an honorarium of twenty-five dollars per day for each day spent in actual attendance in meetings of the judicial council. Members of the council shall be reimbursed for actual expenses necessarily incurred in attending meetings and in the performance of official duties.

This section is alternative to, and cumulative with the removal of justices and judges by impeachment, and original supervisory control of members of the judicial system by the supreme court.

F. Code of Judicial Conduct

Canon 2

* * *

B. Judges should not allow their family, social, or other relationships to influence their judicial conduct or judgment. Judges shall not lend the prestige of their office to advance the private interests of others; nor should judges convey or permit others to convey the impression that they are in a special position to influence the court. Except in a proceeding involving the judge personally or in response to an official summons, Judges shall not testify as a witness in any court proceeding.

Canon 3

* * *

C. Disqualification

1. Judges should disqualify themselves in proceedings in which impartiality might reasonably be questioned or where personal knowledge of disputed evidentiary facts might reasonably affect their impartiality in the proceeding. * * * *

G. Rules of Professional Conduct

* * *

8.3 (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

STATEMENT OF THE CASE

A. The Facts

Delbert Lunders is a college educated real estate broker and the brother-in-law of lawyer Ron Blewett. Lunders represented an elderly couple from a small rural Idaho town in the sale of their ranch land. He also represented a Yakima, Washington, retired widow in the sale of her parents' ranch that was located in the same town.

Lunders brokered the sale of the Snyder property to Blewett for $240,000. When the Snyder's grandson discovered the sale price, he rescinded the sale. The Snyders immediately resold half the land and all the timber for $273,000.

At the same time Lunders brokered the sale of the Steele property to Blewett for $230,000. Within six months Blewett resold the property for $429,000, which, with financing, amounted to $770,000, a gain of $540,000.

Lunders did not explain to his clients that the kinship created a conflict of interest and did not obtain their sellers' informed consent to proceed with the sale.

Lunders then sued the Snyders for a $25,850 real estate commission on the basis he had found them a willing buyer.

The trial judge granted the Snyders summary judgment based on Lunders' affidavit that he was acting only as an agent for the brokerage firm, with which the Snyders had settled. When the trial judge granted the summary judgment, he told Lunders' lawyer that if Lunders would file another affidavit that contradicted his first affidavit, there would be a question of fact and the case could go to trial. Lunders then filed an affidavit that said he was not an agent and that he was the only party to the listing agreement. The case then went to trial.

Despite a jury instruction that "if the broker/agent does not timely reveal kinship and obtain the fully informed and clear consent to proceed, then the principal is not required to pay commission," the jury awarded Lunders $5,760, 23% of the amount sought. The trial judge then awarded Lunders' lawyers $26,369 in lawyer fees and costs for a total judgment of $32,129.

Ron Blewett is a lawyer who practiced law with and was a friend of Idaho Supreme Court Justice Linda Trout. Without disclosing her relationship with Blewett, Trout wrote the supreme court opinion that decided Lunders was not required to obtain the informed consent from his clients, ignored the issue that the jury did not follow the instructions that required informed consent, found nothing amiss in a party filing opposing affidavits to create a question of fact, and awarded Lunders' lawyer another $5,000 in appellate lawyer's fees.

John Bradbury, Snyders' lawyer and the petitioner before this court, filed a complaint against Trout with the Idaho Judicial Council. Because the statute allows only the judge to participate in a disciplinary hearing, the council excluded Bradbury, his clients, the public and the press from the hearing.

The judicial council concluded that Trout had no conflict or relationship which required her to recuse herself. It refused to disclose the factual or legal basis for its conclusion.

B. The District Court Proceeding

Bradbury then filed an amended complaint for declaratory judgment in state district court against the judicial council alleging the exclusion of him as a member of the public from the hearing violated the Fourteenth Amendment. The judicial council moved to dismiss the complaint pursuant to Civil Rule 12(b)(6).

Bradbury argued the public had fundamental First Amendment rights of free speech, and assembly which guaranteed them the right to learn about what their government is doing. He relied on *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578-580 (1980) and its progeny which hold that the rights of free speech and free press and the right of assembly guarantee the right of the public to attend criminal trials and proceedings on the basis the public's presence advances the integrity of what occurs and the right to know what those who govern them are doing.

The complaint also alleged that the exclusion of Bradbury as the complainant from the hearing denied him procedural due process.

At the 12(b)(6) hearing Bradbury argued that his interest in an impartial forum for his clients, his duty to report misconduct and the duty of the judicial council to consider the complaint was "individual entitlement grounded in state law" which entitled him to "the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman*, 455 U.S. 422, 430, 433 (1982).

The district court granted the judicial council's 12(b)(6) motion to dismiss the complaint on the basis there is a legitimate state interest in excluding the public, the press and the complainant from judicial misconduct proceedings and its records. App. C at 30a. The court specifically held that excluding the public and the complainant from the hearing did not violate the substantive or procedural due process requirements of the Fourteenth Amendment. App. C at 31a. It also concluded the complainant had no standing because he was the lawyer rather than the party to the underlying litigation and that in any event he had no property or liberty interest at stake. App. C at 32a-33a.

Without an evidentiary hearing, the district court made factual findings that confidentiality has a rational basis because it assures the effectiveness of the council by encouraging the filing of complaints, protecting against retaliation, protecting judges from publication of unexamined complaints and avoiding the premature publication of groundless claims. The court relied on assertions of the Virginia Judicial Inquiry and Review Commission in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). App. C at 30a.

C. The Idaho Supreme Court Opinion

On appeal the Idaho Supreme Court affirmed the district court decision.

The supreme court decided the public does not have a fundamental First Amendment right to attend judicial council hearings. The court relied on *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9-10 (1986) (*Press-Enterprise II*). The court reasoned that the disciplinary hearings were not criminal proceedings, that they were historically held in secret and that it did not appear public access would play a significant role in the functioning of the council. App. A at 13a-14a.

Having concluded the public does not have a fundamental First Amendment right to attend the judicial council hearing, the court decided there was no presumption of openness and that secret hearings would pass constitutional muster if they served legitimate state interests. The court then concluded that secret hearings did in fact have a rational nexus to the state's legitimate interests. App. A at 16a.

The court relied on the *Landmark*, 435 U.S. at 841. There the Virginia judicial review commission asserted several reasons it thought secret judicial discipline proceedings

served the Commonwealth's interest. Characterizing the assertions as *dicta*, the court concluded they were sufficient to establish that secret hearings encourage the filing of complaints, protect judges from unwarranted complaints, and permit flexibility in disciplining judges. App. A at 15a-16a.

The court also relied on *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (3d Cir. 1986), which concluded that access to disciplinary hearings was of limited usefulness and it would hamper creative disciplinary solutions. App. A at 14a.

Finally the supreme court concluded Bradbury was not deprived of procedural due process because his duty to report judicial misconduct was "insufficient to be a property interest such as those protected by the Fourteenth Amendment." App. A at 19a-20a.

REASONS FOR GRANTING THE WRIT

A. The Idaho Supreme Court has decided an important constitutional issue that has not, but should be, decided by this Court.

The gravamen of the First Amendment liberty to attend hearings is to afford the citizens of this country the ability to be informed about how their government works so they can hold it accountable. *Press-Enterprise II*, 478 U.S. at 7. The expressly guaranteed freedoms of the First Amendment in conjunction with the Fourteenth Amendment "share a common core purpose of assuring freedom of communication on matters related to the functioning of government." *Richmond Newspapers*, 448 U.S. at 575. Despite this precedent and the tradition of openness, all fifty states have some form of confidentiality associated with their judicial disciplinary schemes. *See* Jeffrey Shaman & Yvette Begue,

Silence Isn't always Golden: Reassessing Confidentiality in the Disciplinary Process, 58 TEMPLE L. Q. 755, 756-757 (1985).

The judiciary is an entire branch of a tripartite form of government, and judges do govern. Under our system of government judges are, "in their own sphere, lawmakers — a coordinate branch of government." *Id.* at 595 (Brennan, J., concurring). Their actions affect the lives of countless citizens every day, often in ways more direct and personal than that of the other two branches.

Judges are elected in Idaho and the citizens are periodically called upon to decide if their judges meet their standards. The nuances of the law are a mystery to most lay people, but they do expect the forums to be fair and the judges to be honest and impartial.

The only agency in the state of Idaho that examines and knows about the conduct of judges whose behavior has been questioned is the judicial council. Yet that information is kept from the voters on the astonishing basis that it serves their interests.

That approach is at serious odds with the notion that the right of the public and the media to be present at a trial has "historically been thought to enhance the integrity and quality of what takes place." *Id.* at 578. "[O]pen examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination . . ." *Id.* at 597 (Brennan, J. concurring; quoting 3 Blackstone, Commentaries, 373).

If open hearings to determine the facts about how government works are more reliable and fair, in fact and in appearance, and are constitutionally required as a result, then the propriety of the conduct of the person presiding over those hearings is of profound constitutional moment.

Secret hearings are also bad policy. Public proceedings expose bad judges. But they also exonerate good judges whose conduct has been questioned. Suspicion and speculation are the only victims of openness. Judge's conduct will always be suspect if the course of the proceedings and the factual and legal bases of the council's decisions are shrouded with secrecy. Complainants will naturally assume conduct was improper because of the common assumption that if there were nothing to hide the proceedings would be open.

Lawyers who challenge the *status quo* favored by the judiciary put themselves at grave professional risk. The opportunities for this Court to resolve this issue will be few. The petitioner respectfully submits, therefore, that the time is ripe for this Court to decide whether the constitutional right of access to courts to advance the fairness of the trials should also apply to hearings held to determine if conduct of the person presiding over those trials comported with established standards.

B. The Decision Decides an Important Constitutional Issue that Conflicts with Relevant Decisions of this Court.

In 1978 this Court held that the First Amendment prohibited the criminal prosecution of a publisher whose newspaper had printed confidential information it obtained from a state judicial review proceedings. *Landmark*, 435 U.S. at 846-847.

The Virginia Judicial Inquiry and Review Commission had argued that judicial misconduct proceedings should be secret because it would encourage complaints, protect complainants against retaliation, protect judges from unwarranted complaints and encourage confidence in the

judiciary as an institution. This Court rejected that argument. It held that a state's interest in protecting the reputation of its judges and the judiciary does not justify the suppression of free speech. "[S]peech cannot be punished when the purpose is simply 'to protect the court as a mystical entity of the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed.' " *Id.* at 841-842; (quoting *Bridges v. California*, 314 U.S. 252, 270-271 (1941) (Frankfurter, J., dissenting)).

It was in the face of this precedent that the Idaho Supreme Court concluded:

> The state's interests in preserving the confidentiality of judicial review proceedings recognized by the U.S. Supreme Court are: encouraging the filing of complaints, protecting judges from unwarranted complaints, maintaining confidence in the judiciary by avoiding premature announcement of groundless complaints, and facilitating the review process by allowing flexibility through voluntary retirement or resignation of offending judges. * * * The Court's holding reversing the criminal conviction rested its decision on that these state interests, although legitimate, were insufficient to "justify the encroachment First Amendment [free speech] guarantees by imposing criminal sanctions." *Id.* [*Landmark*] at 841.] Nevertheless, the language in *Landmark* supports the idea that judicial disciplinary proceedings may be confidential.

App. A at 15a-16a.

The supreme court then concluded the Virginia review commission's arguments for confidentiality constituted "*dicta*

acknowledging that several legitimate state interests are served by maintaining confidentiality in judicial review proceedings." App. A at 15a.

The extent of the court's departure from this Court's holding in *Landmark* is apparent when one compares the Virginia judicial commission's arguments for confidentiality with the Idaho statute actually under review. The statute does not withhold the identity of the complainant from the judge, so the possibility of retaliation is not avoided. Judicial Council Act, ch. 67, sec. 3 (1967), *supra*, at 6-7. To the contrary; the only evidence before the court was that a complainant's identify was disclosed to the Idaho Bar Professional Conduct Board in an effort to discredit him. It is doubtful in any event that retaliation can be avoided because the nature of the complaint would usually disclose the identity of the complainant.

There was no evidence that a secret hearing which the complainant cannot attend and to whom no explanation of the council's decision is given and against whom retaliation has actually occurred would encourage complaints. Nor does the statute protect judges from the publication of unwarranted charges against judges. The statute specifically provides "that if allegations against a judge are made public by the complainant, judge or third persons, the judicial council may, in its discretion, comment on the existence, nature and status of any investigation." *Id.*

By adopting the "*dicta*" that confidentiality serves state interests the supreme court disregarded the *Landmark* court's core rationale that the publication of confidential information "clearly served those interests in public scrutiny and discussion of government affairs which the First Amendment was adopted to protect." *Landmark*, 435 U.S. at 839.

Two years after *Landmark* this Court held that the public and the accused shared a common First Amendment right to

attend criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). Chief Justice Burger noted that "whether the public has a right to attend trials in civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." *Id.* at 590 n.17. Justice Stewart concurred, stating that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* at 599.

Since *Richmond Newspapers*, this Court has held that the public and the accused have a shared right to attend all kinds and aspects of criminal proceedings, absent a showing of a compelling government interest that is narrowly tailored to serve that interest. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (trial involving minor sexual abuse victims); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*) (jury selection); *Press-Enterprise II, supra*, (preliminary hearings).

The federal appellate courts extended the right to attend criminal adjudicatory proceedings to civil proceedings as well. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983) (Federal Trade Commission records); *In re Continental Ill. Secs. Litigation* 732 F.2d 1302 (7th Cir. 1984) (sealed corporate report); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (1984) (preliminary injunction hearing); *Grove Fresh Distributors, Inc., v. Everfresh Juice*, 24 F.3d 893 (7th Cir. 1994) (unfair competition trial documents); *see* Eugene Cerruti, *"Dancing in the Courthouse"; The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 266-269 (1995).

Despite this precedent, the supreme court distinguished confidential judicial disciplinary hearings from *Richmond Newspapers* and its progeny on the basis that *Richmond Newspapers* involved criminal trials. App. A at 13a.

The supreme court then set forth the two factors which *Press-Enterprise II* said should be considered: whether the process has been historically open to the public and whether "public access plays a significant positive role in the functioning of the particular process in question." 478 U.S. at 8. App. A at 13a-14a.

The supreme court apparently did not consider it significant that the *Richmond Newspapers* Court looked at what the process was at the time the Constitution was adopted to decide whether the First Amendment should apply to the process.

> "In a variety of contexts this Court has referred to a First Amendment right to receive information and ideas." What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.

Richmond Newspapers, 448 U.S. at 576 (internal citation omitted). Or, as Justice Brennan, concurring, put it, "As a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our Nation."

The supreme court did not discuss the fact that the primary means of disciplining judges in Idaho has been impeachment, an open process since statehood in 1890. Nor did it look at whether disciplining judges had been a secret process in 1789 and before. Without acknowledging that the judicial council was created in 1968, the court said, "Historically, council proceedings have not been open to public access. Since the creation of the council the initial proceedings have been conducted confidentially." App. A at 13a-14a.

Given the long history and tradition of open hearings in America concerning the public's business, and the tradition of the open impeachment hearings since the founding of the Nation and since Idaho's admission to the Union, a thirty-three year old state statute is not much history or tradition upon which to deprive citizens of their First Amendment right to scrutinize what their judges do.

The supreme court then concluded, "it does not appear that public access would play a significant positive role in the functioning of the council in the initial stage." App. A at 16a.

The court's use of the verb "appear" is significant. It was unable to point to any factual predicate for its conclusion. The district court allowed no evidentiary hearing in this case. No data from the judicial council were available because of its confidentiality policy.

Instead it relied on the Virginia review board's rejected argument for confidentiality at the expense of the central thesis of *Landmark* that the publication of confidential information "clearly served those interests in public scrutiny and discussion of governmental affairs which the first amendment was adopted to protect." *Landmark*, 435 U.S. at 841-842. By doing so, it also ignored the core rationale of *Richmond Newspapers* that a courtroom "is a public place where the people generally — and representatives of the media — have a right to be present, and there their presence historically has been thought to enhance the integrity and quality of what takes place." *Richmond Newspapers*, 448 U.S. at 578 (citations omitted). App. A at 14a.

Finally the supreme court tried to distinguish the council's function from a regular trial on the basis that it is a "preliminary investigation into the complaint before

determining whether to proceed with a recommendation for discipline with this Court." App. A at 16a.

The council is manifestly an adjudicatory forum. The statute assigns the council the duty of recommending "the removal, discipline and retirement of judicial officers, including magistrates . . ." Judicial Council Act, ch. 67, sec. 2(4), *supra*, at 5. It then authorizes the council, "after such investigation as the council deems necessary, order a hearing to be held before it concerning the removal, discipline or retirement of a justice or judge . . ." *Id.*, sec. 3, *supra*, at 7. Then council, based either on the hearing, or on the record, findings and report of appointed masters, must decide either there is no cause to proceed or recommend removal, discipline or retirement if it finds good cause. *Id.*

The complaint filed with the council made a prima facie case of judicial impropriety. The council, therefore, necessarily made a factual finding and reached a legal conclusion based on some showing in addition to what was evident from the complaint. The decision was made by the council members, who are appointed by the governor and confirmed by the state senate. It involved the conduct of a public official while engaged in her official duties. A decision not to proceed with a formal hearing is as much a decision as a decision to proceed. It is an adjudication.

Similarly, in *Press-Enterprise II* the State of California argued that preliminary hearings in criminal proceedings could be confidential because a trial was not involved, only a decision of whether to proceed to trial. This Court made short shrift of that argument, stating that "[b]ecause of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding." 478 U.S. at 12.

So it is with the judicial council in Idaho. During the 32 years of its existence there has been only one formal disciplinary hearing. *See Idaho Judicial Counsel v. Becker*, 122 Idaho 288, 834 P.2d 290 (1992). While the council does not publish the number of complaints it handles, one can assume over that span of time, they number in the hundreds.

In fact, this Court found the reasons for openness even more compelling in a preliminary hearing than in a trial, because "in the absence of a jury, long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge,' *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), makes the importance of public access to a preliminary hearing even more significant." *Press Enterprise II*, 478 U.S. at 13.

The supreme court also concluded that a presumption of openness does not attach to council hearings. That is a remarkable approach, given this Court's unequivocal and unambiguous mandate to the courts of this nation that trials cannot be closed to the public unless "specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.' " *Press-Enterprise II*, 478 U.S. at 13-14 (quoting *Press-Enterprise I*, 464 U.S. at 510).

The critical importance of factually establishing a compelling higher value was established when this Court rejected the *Commonwealth of Massachusetts'* argument in *Globe Newspaper* that closure would encourage witnesses to come forward in a child sex abuse case because there was no *empirical evidence* to that effect and because it ran counter to the "presumption of openness [that] inheres in the very nature of a criminal trial in our system of justice." *Globe Newspaper*, 457 U.S. at 610 (quoting *Richmond Newspapers*, 448 U.S. at 573).

Finally, the supreme court's decision that Bradbury did not have a sufficient interest in the judge's conduct to warrant his right to attend a fair hearing on the merits also departs from established precedent.

A lawyer in Idaho is legally required to report judicial misconduct. Rules of Professional Conduct, 8.3(b) *supra*, at 8. The council is statutorily required to determine if the complaint has merit. Judicial Council Act, ch. 67, sec. 3, *supra*, at 6. Bradbury has a fiduciary obligation to represent his client and that includes a duty to insure his client has a hearing before an impartial forum as required by the Code of Judicial Conduct, Canons 2 and 3, *supra*, at 8, and the Rules of Professional Conduct, Rule 8.3(b). *supra*, at 8.

A complaint for which redress or a remedy is available is a chose-in-action which constitutes a property interest.

> The hallmark of property, the court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except for cause. Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating to the whole domain of social and economic fact.

Logan v. Zimmerman, 455 U.S. 422, 430 (1982) (citations and internal quotation marks omitted); *see Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

The net result is secret hearings from which the press, public and complainant are excluded. As the law now stands in Idaho only the judge can attend the council hearings; so the hearings are not only secret, they are also statutorily rigged in favor of the judge. That does not afford "the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan*, 455 U.S. at 433.

CONCLUSION

The First Amendment liberties of speech, press, and assembly are of little value to citizens who are kept from knowing what their government is up to. There would be little to talk about, print or assemble for. Our Nation has a constitutional and cultural tradition of openness. When the government closes its business to scrutiny, the losers are the integrity of the process and an informed citizenry. Ironically, an equally real victim is the credibility of the judiciary because the public will not accept what it cannot observe.

All of the states impose some sort of confidentiality on judicial disciplinary hearings. It is important for this Court to decide whether citizens should have the same right of access to information about their judges that they now have to information about the other public officials who govern them. The alternative, as Justice Frankfurter put it, is "to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in democracy other public servants are exposed." *Landmark*, 435 U.S. at 841-842 (quoting *Bridges v. California*, 314 U.S. 291 (Frankfurter, J. dissenting.)).

Finally, lawyers, as officers of the court, should have a liberty and property interest to ensure a fair hearing for their clients and to attend hearings where that issue is decided. They have an economic and professional interest at stake and they are uniquely qualified to know when hearings are not fair or judges do not measure up to established standards and what can and should be done when that happens.

Petitioner respectfully requests this Court to grant this petition to decide whether citizens should have the constitutional right to scrutinize the judges who govern them or whether that scrutiny should be meted out only as a matter of privilege by those who govern.

Respectfully submitted,

JOHN H. BRADBURY, ESQ.
Petitioner, Pro Se
729 Preston Avenue
Lewiston, Idaho 83501
(208) 746-3100

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF IDAHO DATED AND FILED JULY 10, 2001

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 26361

Boise, February 2001 Term
2001 Opinion No. 63
Filed: July 10, 2001
Frederick C. Lyon, Clerk

JOHN H. BRADBURY,

Plaintiff-Appellant,

v.

IDAHO JUDICIAL COUNCIL,

Defendant-Respondent.

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

* * *

SCHROEDER, Justice.

John Bradbury (Bradbury) appeals the district court order granting the Idaho Judicial Council's (the Council) motion

to dismiss his complaint for declaratory judgment seeking access to the Council's records of investigatory proceedings and requesting an order for a new hearing which he and the public could attend. Bradbury asserted his and the public's right of access to Council proceedings. The district court dismissed his claims. This Court affirms the decision of the district court.

I.

BACKGROUND AND PRIOR PROCEEDINGS

Bradbury is an attorney practicing law in Idaho who represented parties in a proceeding in district court. Following unsuccessful litigation in that case, he appealed to the Idaho Supreme Court which unanimously affirmed the district court decision. Bradbury subsequently filed a petition for rehearing and a motion to disqualify the authoring justice. Both motions were denied by the Court. Bradbury then filed a complaint with the Council against the authoring justice alleging violations of the Code of Judicial Conduct. The Council conducted proceedings and determined that there were no violations.

Following the decision of the Council, Bradbury requested information from the Council, including the minutes and the record of the proceedings and the procedure used by the Council in reaching the decision. The request was made pursuant to the public records legislation ensuring citizens the right to examine and copy public records. Idaho Code (I.C.) § 9-338. The Council denied Bradbury's request, stating that the information was confidential and unavailable for

release pursuant to Idaho Court Administrative Rule (I.C.A.R.) 32(d)(20).[1]

Bradbury filed an action for declaratory judgment and an order to permit inspection and copying of documents, arguing that the failure to release the information violated both his substantive and procedural due process rights guaranteed by the Fourteenth Amendment of the United States Constitution. Bradbury sought an order from the district court to the Council to provide the material pursuant to I.C. § 67-2340 *et seq.* The Council moved to dismiss the action, and the district court granted the motion, determining that the Council had properly denied the request and that Bradbury's due process rights were not violated. Further, the district court found Bradbury lacked standing to raise the constitutional issue on behalf of the public at large. Bradbury appeals the district court's decision to this Court. He asks this Court to reverse the district court and order the Council to allow him to access the records. He also seeks to have the Council hold a new hearing which he and the public may attend.

II.

STANDARD OF REVIEW

I.R.C.P. 12(b)(6) states, in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a

1. I.C.A.R. was amended soon after this suit was filed. This cite to Rule 32(d)(20) is from the 1999 volume of the Idaho Court Rules. The current citation is I.C.A.R. 32(d)(21).

> claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . .

The Court's standard of review for an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6) is the same as the summary judgment standard of review. *See Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398, 987 P.2d 300, 310 (1999); *see also Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995). After viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. *Coghlan*, 133 Idaho at 398, 987 P.2d at 310. "The issue is not whether the plaintiff will ultimately prevail, but whether the party is 'entitled to offer evidence to support the claims.' " *Id.*, *citing Orthman* 126 Idaho at 962, 895 P.2d at 563, *quoting Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (citation omitted).

III.

THE DISTRICT COURT PROPERLY GRANTED THE MOTION TO DISMISS.

The district court determined that I.C.A.R. 32(d)(20) and I.C. § 1-2103 do not unconstitutionally infringe Bradbury's due process rights and, therefore, he had not asserted a claim upon which relief could be granted. The district court also held that Bradbury had no standing to assert claims on behalf of the public in general. However, the district court

determined the merits of Bradbury's claims. Because there are no greater rights in the public at large than Bradbury might possess individually, regardless of whether he has standing to assert claims on behalf of the public, this Court will address the merits of the claims.

A. Standard Of Review

Because constitutional questions are purely questions of law, they are reviewed *de novo*. *See V-1 Oil Co. v. Idaho State Tax Comm'n*, 134 Idaho 716, 718, 9 P.3d 519, 521 (2000), *citing Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 905-906, 980 P.2d 566, 569-570 (1999). When deciding whether an individual's constitutional rights have been violated, this Court must independently decide whether the facts on the record show a violation of the fundamental constitutional rights at issue. The Court should, whenever possible, construe a statute so as to achieve a constitutional result. *See Matter of 1979 Valuation of Parcel No. R2348750330*, 104 Idaho 681, 688, 662 P.2d 1125, 1132 (1983). The general rule is that the party challenging a statute on constitutional grounds "must overcome a strong presumption of validity." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999), *citing State v. Avelar*, 129 Idaho 700, 703, 931 P.2d 1218, 1221 (1997); *see also Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). Again it is a general rule that "a legislative act should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that a law should not be held to be void for repugnancy to the Constitution in a doubtful case." *Sanderson v. Salmon River Canal Co.*, 45 Idaho 244, 256, 263 P. 32, 35 (1927). However, the general presumption is not always applicable.

> It has been held in some jurisdictions that when it is proposed by a statute to deny, modify, or diminish a right or immunity secured to the people by a clear and explicit constitutional provision, the presumption in favor of the constitutionality of statutes no longer applies, but a contrary presumption arises against the validity of such statute. Similarly, it has been said that the presumption of constitutionality is inapplicable in civil rights cases involving fundamental constitutional rights.

16 AM. JUR. 2D *Constitutional Law* § 215 (1979).

When a statute infringes on a fundamental right or a suspect class, the presumption is that the statute is invalid unless the state can demonstrate the statute is necessary to serve a compelling state interest. *See Heller v. Doe*, 509 U.S. 312, 319 (1993) ("A classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."); *see also Vacco v. Quill*, 521 U.S. 793 (1997). The United States Supreme Court has stated:

> State laws are generally entitled to a presumption of validity against attack. . . .
>
> Not all legislation, however, is entitled to the same presumption of validity. The presumption is not present when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications,

in a constitutional sense, are inherently "suspect." *McLaughlin v. Florida*, 379 U.S. 184; *Brown v. Board of Education*, 347 U.S. 483. And the presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes. See, *e.g.*, *Oyama v. California*, 332 U.S. 633 (national origin); *Graham v. Richardson*, 403 U.S. 365 (alienage); *Gomez v. Perez*, 409 U.S. 535 (illegitimacy); *Reed v. Reed*, 404 U.S. 71 (gender).

In the absence of indivious discrimination, however, a court is not free . . . to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures. . . . The threshold question, therefore, is whether the . . . statute is invidiously discriminatory. If it is not, it is entitled to a presumption of validity. . . .

Parham v. Hughes, 441 U.S. 347, 351-352 (1979).

Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser*

v. Randall, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Patterson v. New York, 432 U.S. 197, 201-202 (1977); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

Another way of analyzing the presumptions applicable when the constitutionality of a state law is challenged is in terms of the level of scrutiny that is utilized. The United States Supreme Court has adopted three different standards of review: strict scrutiny, intermediate scrutiny, and rational basis. Strict scrutiny should be applied to legislation dealing with fundamental rights or suspect classifications. *In re McNeely*, 119 Idaho 182, 189, 804 P.2d 911, 918 (Ct. App. 1991), *citing United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 (1938) (citations omitted).[2] Strict scrutiny

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2. In, *Coleman v. State*, 114 Idaho, 901, 906, 762 P.2d 814, 819 (1988) (Bakes, J. dissenting at n. 2), this Court has delineated a list of rights that the United States Supreme Court has considered fundamental and those that are not: (1) the right to travel interstate, *Jones v. Helms*, 452 U.S. 412 (1981); (2) the freedom of association, *Bates v. City of Little Rock*, 361 U.S. 516 (1960); (3) the right to participate in the electoral process, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); (4) the right to privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); access to courts, *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980). Those not considered fundamental rights are: (1) the right to an equal education, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); (2) the right to government employment, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); and (3) the right to a statute of limitations defense, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988).

requires that the government action be necessary to serve a compelling state interest, and that it is narrowly tailored to achieve that interest.

Where no fundamental right or suspect classification is involved or when dealing with legislation involving social or economic interests, courts apply the rational basis test's deferential standard of review. In this context, this Court has stated that:

> "Substantive due process" means "that state action which deprives [a person] of life, liberty, or property must have a rational basis — that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.' "

Pace v. Hymas, 111 Idaho 581, 586, 726 P.2d 693, 698 (1986) (brackets in original); *see also Sandpoint Convalescent Services, Inc. v. Idaho Dep't of Health and Welfare*, 114 Idaho 281, 756 P.2d 398 (1988); and *In re McNeely*, 119 Idaho at 189, 804 P.2d at 918 (citations omitted). Thus, substantive due process requires that "a statute bear a reasonable relationship to a permissible legislative objective." *Aberdeen-Springfield Canal Co.*, 133 Idaho at 90, 982 P.2d at 925 (citation omitted).

When a state law is challenged on constitutional grounds it is necessary to determine the nature of the right claimed to be infringed. If it is a fundamental right, strict scrutiny applies — that is, the presumption in favor of constitutionality is not applicable. The state must show a compelling interest to

vindicate the law. If, however, the law does not infringe a fundamental constitutional right, the rational basis text is applicable — the presumption is then in favor of the state. Consequently, this Court must determine the nature of the right claimed in this case.[3]

B. The Confidentiality of Judicial Council Proceedings Does Not Infringe A Fundamental Right.

Bradbury claims the district court erred in determining that both I.C.A.R. 32(d)(20) and I.C. § 1-2103 are constitutional. The Council's denial of Bradbury's request for a copy of the proceeding's record was based on I.C.A.R. 32(d)(20), which states:

> (d) **Categories of Proceedings With Records Exempt From Disclosure.** Except as provided in paragraph (e) of this rule, the following case files and records are confidential and are exempt from disclosure:
>
> . . .
>
> (20) All records and records of proceedings, except the identity of applicants for appointment to judicial office, of the Idaho Judicial Council or any Magistrate Commission pertaining to the appointment, performance, removal, disability, retirement or disciplining of magistrates, judges or justices. Provided, however, that the record of

3. It is clear that intermediate scrutiny is not applicable in this case.

> a disciplinary proceeding filed by the Judicial Council in the Supreme Court loses its confidential character upon filing.

I.C. § 1-2103 pertains to the procedure employed in the removal, disciplining, or retirement of judges or justices and states, in relevant part, that:

> All papers filed with and the proceedings before the judicial council or masters appointed by the Supreme Court, pursuant to this section, shall be subject to disclosure according to chapter 3, title 9, Idaho Code, provided, however, that if allegations against a judge are made public by the complainant, judge or third persons, the judicial council may, in its discretion, comment on the existence, nature, and status of any investigation. *The filing of papers with and the giving of testimony before the council or the masters shall be privileged*; but no other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the council in the Supreme Court continues privileged and upon such filing loses its confidential character and (b) a writing which was privileged prior to its filing with the council . . . does not lose such privilege by such filing.

Id. (emphasis added). Bradbury claims that Rule 32(d)(20) and I.C. § 1-2103 violate his due process rights by preventing him from obtaining notice of the Council's proceedings and copies of the records of those proceedings. I.C. § 1-2103

refers to Council papers and proceedings as being "subject to disclosure according to chapter 3, title 9, Idaho Code. . . ." I.C. § 1-2103. However, chapter 3, title 9, exempts from disclosure those records that are "otherwise expressly provided by statute." I.C. § 9-338(1).[4] Following the reference to chapter 3, title 9, I.C. § 1-2103 provides that "the filing of papers with and the giving of testimony before the council on the rosters shall be privileged. . . ." While there may be some Council records subject to disclosure pursuant to I.C. § 1-2103, the records and proceedings sought by Bradbury are not. Therefore, it is necessary to examine the constitutional challenge Bradbury makes to the confidentiality of the records and proceedings of the Council in this case.

1. Substantive due process

The Fourteenth Amendment to the United States Constitution secures both substantive and procedural due process rights. As noted, strict scrutiny should be applied to legislation dealing with fundamental rights or suspect classifications. *In re McNeely*, 119 Idaho 182, 189, 804 P.2d 911, 918 (Ct. App. 1991), *citing United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 (1938) (citations omitted).

Bradbury argues that strict scrutiny applies in this case because he has a fundamental right of access that has been infringed by the Council's refusal to release the record of the proceedings. Bradbury relies upon United States Supreme Court cases recognizing the right of access in criminal

4. Previously at I.C.§ 9-340(1)(9) (1998) and I.C. § 9-340A(1) (1999).

proceedings. The First Amendment right of access is fundamental to criminal trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The right has been extended to *voir dire* examinations (*Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984)); pretrial proceedings (*El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993)); and courts are required to show a compelling interest before the testimony of child victims of sex crimes are closed to the public (*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)).

A First Amendment right of access claim attaches in a criminal proceeding where "two complementary considerations" are met. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 at 8 (1986), *citing Globe Newspaper Co.*, 457 U.S. at 605 and *Richmond Newspapers, Inc.* 448 U.S. at 589. First, experience, "whether the place and process have historically been open to the press and general public." *Press-Enterprise Co.*, 478 U.S. at 8. Second, logic, "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 9. Where a proceeding passes these two tests, "a qualified First Amendment right of public access attaches." *Id.* The right of access is not absolute and may be overcome by an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.*, *citing Press-Enterprise Co.*, 464 U.S. at 510.

The Council's proceedings are not criminal nor do they meet the two tests enunciated in *Press-Enterprise*. Historically, Council proceedings have not been open to public access. Since the creation of the Council the initial

proceedings have been conducted confidentially. Additionally, it does not appear that public access would play a significant positive role in the functioning of the Council in the initial stage.

The United States Court of Appeals for the Third Circuit has examined confidentiality in judicial review proceedings in the context of an access to court argument in *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (3rd Cir. 1986), in which a local newspaper published portions of the transcript from a judicial review proceeding. The applicable statute prevented disclosure of review proceedings unless the review board made a recommendation to the state supreme court to impose discipline. The newspaper argued that the statute infringed on the right of access to courts by preventing the disclosure of the record. The Third Circuit determined an access to courts argument was "of limited usefulness in the context of the fundamentally different procedures of judicial disciplinary boards" because "[t]hese administrative proceedings, unlike conventional criminal and civil trials, do not have a long history of openness." *Id.* at 472. The Court went on to state that "[f]orcing judicial review proceedings into an older criminal procedural mold would have a stifling effect on a state's ability to use creative methods in solving its problems." *Id.* The Third Circuit ultimately held that the newspaper had failed to show that the right of access justifies restricting a state's freedom of choice to choose a judicial review process that is confidential. *Id.* (stating that "[i]t is quite uncertain whether the state would have chosen a judicial disciplinary program or have been able to implement one in the absence of the confidentiality provision.").

Appendix A

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the U.S. Supreme Court dealt with a Virginia statute that allowed criminal punishment for any person who divulged information regarding a judicial review proceeding. A newspaper owner was tried and convicted under the statute for publishing an article identifying a judge who was under investigation by the judicial review board. The Court reversed the conviction and held that "the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom." *Id.* at 838. However, the Court in *Landmark* expressly stated that a "constitutional challenge to a State's power to keep the Commission's proceedings confidential," was not before the Court. *Id.* at 837. Therefore, the impact of the *Landmark* decision to this case is limited to the Court's discussion in *dicta* acknowledging that several legitimate state interests are served by maintaining confidentiality in judicial review proceedings. *Id.* The state's interests in preserving the confidentiality of judicial review proceedings recognized by the U.S. Supreme Court are: encouraging the filing of complaints, protecting judges from unwarranted complaints, maintaining confidence in the judiciary by avoiding premature announcement of groundless complaints, and facilitating the review process by allowing flexibility through voluntary retirement or resignation of offending judges. *Id.*, *see also The First Amendment Coalition*, 784 F.2d at 476. The Court's holding reversing the criminal conviction rested on its decision that these state interests, although legitimate, were insufficient to "justify the encroachment on First

Amendment [free speech] guarantees by imposing criminal sanctions." *Id.* at 841. Nevertheless, the language in *Landmark* supports the idea that judicial disciplinary proceedings may be confidential.

In this case, the legitimate state interests are sufficiently related to the confidentiality procedures encompassed in I.C.A.R. 32(d)(20) and I.C. § 1-2103. Both I.C.A.R. 32(d)(20) and I.C. § 1-2103 require confidentiality only for the limited purpose of allowing the Council to conduct a preliminary investigation into the complaint before determining whether to proceed with a recommendation for discipline with this Court. This limited period of confidentiality is rationally related to the state's legitimate interests and, therefore, meets the rational basis test. Bradbury's substantive due process rights are not violated by either I.C.A.R. 32(d)(20) or I.C. § 1-2103, because the state's interest are rationally related to the statutes' confidentiality requirement in Council proceedings.

2. Procedural Due Process

Bradbury also asserts that the district court erred in concluding that I.C.A.R. 32(d)(20) and I.C. § 1-2103 did not violate his procedural due process rights, arguing that the failure of the Council to provide notice of when the proceedings would take place and allowing the public and Bradbury to attend the proceedings infringed on his procedural due process rights. The district court determined that Bradbury had no property right in the proceeding, because he was only a witness, not a party or a litigant. The district court distinguished Bradbury's rights to those of the

judge who was subject of the investigation, who possesses a property right in the proceeding. On this basis the district court determined that Bradbury's procedural due process rights were not infringed.

A procedural due process inquiry is focused on determining whether the procedure employed is fair. The due process clause of the Fourteenth Amendment "prohibits deprivation of life, liberty, or property without 'fundamental fairness' through governmental conduct that offends the community's sense of justice, decency and fair play." *Maresh v. State of Idaho Dep't of Health and Welfare*, 132 Idaho 221, 225-26, 970 P.2d 14, 19-20 (1998) *citing Moran v. Burbine*, 475 U.S. 412, 432-34 (1986). Procedural due process is the aspect of due process relating to the minimal requirements of notice and a hearing if the deprivation of a significant life, liberty, or property interest may occur. A deprivation of property encompasses claims where there is a legitimate claim or entitlement to the asserted benefit under either state or federal law. *See id. citing Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). The minimal requirements are that "there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when the defendant is provided with notice and an opportunity to be heard." *Aberdeen-Springfield Canal Co.*, 133 Idaho at 91, 982 P.2d at 926, *citing State v. Rhoades*, 121 Idaho 63, 72, 822 P.2d 960, 969 (1991); *see also A.E. "Ed" Fridenstine v. Idaho Dep't of Administration*, 133 Idaho 188, 983 P.2d 842 (1999). The opportunity to be heard must occur "at a meaningful time and in a meaningful manner" in order to satisfy the due process requirement. *Aberdeen-Springfield*

Canal Co., 133 Idaho at 91, 982 P.2d at 926, *citing Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998); *see also City of Boise v. Industrial Comm'n*, 129 Idaho 906, 935 P.2d 169 (1997).

Due process, however, is not a concept to be applied rigidly in every matter. It "is a flexible concept calling for such procedural protections as are warranted by the particular situation." *Id.*; *see also Moran v. Burbine*, 475 U.S. at 432-34; *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Aeschliman v. State*, 132 Idaho 397, 973 P.2d 749 (1999); *City of Boise v. Industrial Comm'n*, 129 Idaho 906, 935 P.2d 169 (1997); and *Matter of Wilson*, 128 Idaho 161, 167, 911 P.2d 754, 760 (1996).

To determine whether an individual's due process rights under the Fourteenth Amendment have been violated, courts must engage in a two-step analysis. The Court must first decide whether the individual's threatened interest is a liberty or property interest under the Fourteenth Amendment. *See Maresh*, 132 Idaho at 226, 970 P.2d at 19, *citing Schevers v. State*, 129 Idaho 573, 575, 930 P.2d 603, 605 (1996) (citations omitted); *see also True v. Dep't of Health and Welfare*, 103 Idaho 151, 645 P.2d 891 (1982), *citing Goss v. Lopez*, 419 U.S. 565 (1975). Only after a court finds a liberty or property interest will it reach the next step of analysis in which it determines what process is due. *See Maresh*, 132 Idaho at 226, 970 P.2d at 19, *citing Schevers* 129 Idaho at 575, 930 P.2d at 605. In this case, since "[t]he requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property," the existence of

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Bradbury's right to due process protections regarding his request to access the Council's proceedings depends on whether his interest is within the scope of the liberty or property language of the Fourteenth Amendment. *Maresh*, 132 Idaho at 226, 970 P.2d at 19, *citing Roth*, 408 U.S. at 569.

Whether a property interest exists can be determined only by an examination of the particular statute, rule or ordinance in question. *See Ferguson v. Board of Trustees of Bonner County Sch.*, 98 Idaho 359, 564 P.2d 971, 975 (1977), *citing Bishop v. Wood*, 426 U.S. 341 (1976) ("Determination of whether a particular right or privilege is a property interest is a matter of state law."). The existence of a liberty or property interest depends on the "construction of the relevant statutes," and the "nature of the interest at stake." *Maresh*, 132 Idaho at 226, 970 P.2d at 19, *citing True*, 103 Idaho at 154, 645 P.2d 891 (citations omitted). The procedural protection of property guaranteed by the Fourteenth Amendment "is a safeguard of the security of interests that a person has already acquired in specific benefits." *Maresh*, 132 Idaho at 226, 970 P.2d at 19, *citing Roth*, 408 U.S. at 576.

Bradbury claims he possesses a property right which is based on his interest and legal duty to report unethical judicial conduct. This argument is unpersuasive. Merely possessing an interest or being imposed with a duty to report is insufficient to be a property interest such as those protected by the Fourteenth Amendment. The Rules of Professional Conduct for attorneys are not intended to secure a property interest in the reports of misconduct made by attorneys, even

where the rules impose a duty on attorneys to report misconduct. Moreover, the property interests protected by the Fourteenth Amendment exist where there is a "deprivation of a significant life, liberty, or property interest. . . ." *Aberdeen-Springfield Canal Co.*, 133 Idaho at 91, 982 P.2d at 926. The interest asserted by Bradbury does not rise to the level contemplated by the Fourteenth Amendment for procedural due process protection. The district court was correct that Bradbury lacked a property interest in the Council's proceedings. Consequently, there was no violation of procedural due process.

IV.

CONCLUSION

The decision of the district court is affirmed. Costs are awarded to the respondent.

Justices WALTERS and EISMANN and Justice Pro Tem HURLBUTT **CONCUR.**

Justice KIDWELL, **CONCURRING IN PART AND DISSENTING IN PART.**

Appendix A

Justice KIDWELL, **DISSENTING AS TO THE AWARD OF COSTS.**

I respectfully dissent to the award of costs to the respondent. Because the Judicial Council is closely associated with the judicial branch of government, I believe the better policy in this instance would be to follow the Court's recent decision in *Teevan v. State*, 130 Idaho 79, 936 P.2d 1321 (1997), and decline an award of costs.

APPENDIX B — REMITTITUR OF THE SUPREME COURT OF THE STATE OF IDAHO DATED AUGUST 1, 2001

IN THE SUPREME COURT OF THE STATE OF IDAHO

NO. 26361

JOHN BRADBURY,

Plaintiff-Appellant,

v.

IDAHO JUDICIAL COUNCIL,

Defendant-Respondent.

REMITTITUR

TO: FOURTH JUDICIAL DISTRICT, COUNTY OF ADA.

The Court having announced its Opinion in this cause July 10, 2001, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required; and

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IT IS FURTHER ORDERED, inasmuch as no memorandum of costs on appeal was filed, such costs are hereby waived.

DATED this 1st day of August 2001.

s/ Frederick C. Lyon
Clerk of the Supreme Court
STATE OF IDAHO

APPENDIX C — MEMORANDUM DECISION AND ORDER OF THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA DATED AND FILED FEBRUARY 18, 2000

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 9902777D

JOHN BRADBURY,

Plaintiff,

vs.

IDAHO JUDICIAL COUNCIL,

Defendant.

MEMORANDUM DECISION AND ORDER

Before the Court is Defendant Idaho Judicial Council's ("Council") Motion to Dismiss Plaintiff John Bradbury's ("Plaintiff") Amended Complaint For Declaratory Judgment and Order to Permit Inspection and Copying of Documents. The parties stipulated that oral argument be waived, and after considering the pleadings and the entire record, this matter was taken under advisement. Jurisdiction and venue are proper under I.C. § 1-2103, § 9-343 and § 1-701.

Appendix C

I.

FACTS AND PROCEDURE

Plaintiff brought a complaint to the Council against Idaho Supreme Court Chief Justice Linda Copple Trout. In so doing, he alleged that Chief Justice Trout should have recused herself from hearing his client's case, *Lunders v. Snyder*, Case No. 23422, due to a conflict. It was alleged that there existed a relationship between Chief Justice Trout and Mr. Ronald Hewitt, a party to the transaction at issue, which, pursuant to Canon of Judicial Conduct 3C1, mandated that Chief Justice Trout recuse herself from hearing the case.

Upon receiving this complaint, the Council held a closed hearing on the matter, and determined that no conflict or relationship existed which mandated Chief Justice Trout recuse herself. Plaintiff was not notified of this hearing and was not in attendance. Thereafter, Plaintiff requested the minutes and record of the proceedings of the hearing. He invoked his perceived "legal rights to public documents and to attend public meetings". He was denied access to such records, whereupon, on May 21, 1999, he filed a Complaint for Declaratory Judgment and Order to Permit Inspection and Copying of Documents with this Court.

In this Complaint Plaintiff asserted that pursuant to I.C. § 1-2103 and § 9-338(1), all papers filed with, and the proceedings before the Council shall be subject to disclosure. He further argued that the "secret" hearing on the matter was contrary to public policy pursuant to the Idaho Open Meeting Laws found at I.C. § 67-2340 et.seq., and he requested that

the Council be ordered to comply with them. It was his view that the Council is a "public agency" as defined in § 67-2341, and thus, subject to the Open Meeting Laws.

In response, the Council asserted that Idaho Court Administrative Rule (I.C.A.R.) 32(d)(20) prohibited disclosure of the requested documents. Specifically, the Council argued I.C.A.R. 32(d)(20) exempted such records from disclosure. Further, the Council argued it is not a "public agency" under § 67-2341(4)(a), and therefore, is not subject to the Open Meeting Laws. Based on these assertions, the Council moved to dismiss the complaint under I.R.C.P. 12(b)(6), and also moved for attorneys fees.

The Court heard oral argument on this matter on August 2, 1999, and after considering the arguments of the parties, the pleadings and the record, it was taken under advisement. The Court found the Council's arguments on the issues persuasive.

Plaintiffs reading of § 67-2341(4)(a) is wrong

§ 67-2341(4)(a) reads:

> "Public agency" means: any state board, commission, department, authority, educational institution or other state agency which is created by or pursuant to statute, **other than** courts and their agencies and divisions, **and the judicial council**, and the district magistrates commission;

I.C. § 67-2341(4)(a) (bold added).

It is clear that the language "other than" means "except", and therefore, where "judicial council" follows "other than" it logically follows that the judicial council is not a "public agency", and not subject to the Open Meeting Laws.

Contrary to Plaintiff's assertions, there is no conflict between I.C.A.R. 32(d)(20) and any statutory provisions. In fact, I.C. § 1-2103 provides that "the filing of papers with and the giving testimony before the council or the masters shall be privileged". Further, § 1-2103 provides that all papers filed with and proceedings before the Council are subject to disclosure pursuant to the provisions of the Idaho Public Records Act set forth in I.C. § 9-300 et.seq. Upon referencing the Idaho Public Records Act, it is found that I.C. § 9-340 exempts certain records from disclosure: "(1) Exemption under state or federal law, or court rule". It is clear, therefore, from a reading of § 1-2103 that the records Plaintiff wants disclosed, are only subject to disclosure pursuant to the Idaho Public Records Act, and § 9-340 of this Act provides that the records are exempt from disclosure if they are exempted under state law. Since § 1-2103 provides that "the filing of papers with and the giving of testimony before the council . . . shall be privileged", and § 1-2103 is state law, it follows that the records are indeed exempt from disclosure under § 9-340. Additionally, I.C.A.R. 32(d)(20) is a "court rule" under § 9-340(1), also providing grounds for exemption from disclosure.

Based on this analysis, in an August 5, 1999 Order, the Court denied the Plaintiff's Motion for Declaratory Judgment and Order Permitting Inspection and Copying of Documents and held Defendant's Motion to Dismiss in abeyance pending further proceedings. Attorneys fees were denied. In this order,

Plaintiff was granted leave to amend his complaint to allege constitutional due process violations.

Plaintiff filed an Amended Complaint on September 10, 1999. In it, he makes the same allegations as he did in the original Complaint, but additionally alleged that his substantive due process rights, his procedural due process rights, and his equal protection rights under the 14th Amendment were violated. Specifically, he argues that the exclusion of the public in general and Plaintiff in particular from the records and proceedings of the Council violated the above-enumerated rights. The Council again responded with a Motion to Dismiss under I.R.C.P. 12(b)(6).

II.

STANDARD OF REVIEW

The standard for considering a motion for dismissal pursuant to I.R.C.P. 12(b)(6) is the same as the standard for the granting of a motion for summary judgment in that the non-moving party is entitled to have all inferences from the record and pleadings viewed in his or her favor, an only then may the question be asked whether a claim for relief has been stated. *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 598, 850 P.2d 724 (1993). The motion may be granted when it appears that the plaintiff can prove no set of facts in support of his claim. *Ernst v. Heminway & Moser, Co.*, 120 Idaho 941, 946, 821 P.2d 996, 1001 (Ct. App. 1991), modified, 126 Idaho 980, 895 P.2d 581 (1995). The only facts which a court may properly consider on a motion to dismiss for failure to state a claim are those appearing in the complaint, supplemented by those

facts of which the court may properly take judicial notice. If matters outside the pleadings are submitted in support of the motion and not excluded by the court, it is treated as a motion for summary judgment, rather than a motion for dismissal under 12(b)(6). See I.R.C.P. 12(b); *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990).

III.

ANALYSIS

A. The exclusion of the public in general and Plaintiff in particular from the records and proceedings of the judicial council does not violate Plaintiff's 14th Amendment substantive due process rights.

By alleging a substantive due process violation, although vaguely, Plaintiff appears to attack the constitutionality of I.C. § 1-2103. It is this statute, effectively, which exempts the records to which he requested access. Plaintiff's arguments have no merit.

Plaintiff cannot assert rights of the "public in general". He has no standing. Claims brought must allege real and definite personal rights.

Concerning Plaintiff's rights, the Due Process Clause protects those fundamental rights and liberties which are objectively "deeply rooted in this Nation's history and tradition" and implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed". *Washington v. Glucksburg*, 521 U.S. 702, 720-22, 117 S.Ct. 2258, 2268 (1997). If the right alleged is a

fundamental one, strict scrutiny would apply. But if the right is not fundamental, all that needs to be shown to uphold a substantive due process challenge is that the statute has a reasonable relation to a legitimate state interest. 16B Am. Jur.2d *Constitutional Law* § 912 (1998).

Looking at Plaintiff's claim, there is no recognized "fundamental right" of allowing a complainant before the Council the right to obtain confidential records and proceedings of the Council, or to be notified when the Council will deliberate or conduct its proceedings. Absent such a right, rational basis scrutiny is applied. If there is a legitimate state interest and the statute is reasonably related to that state interest, the statute is constitutional. Here there is a legitimate state interest supporting I.C. § 1-2103. Confidentiality of the records insures the ultimate effectiveness of the judicial council. It encourages the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 834-36 (1978). Even more importantly, it protects judges from the inquiry which might result from publication of unexamined and unwarranted complaints. Id. Confidence in the judiciary is maintained by avoiding premature announcement of groundless claims of judicial misconduct since it can assumed that some frivolous complaints will be made against judicial officers who cannot always satisfy all the litigants. Id. There being a rational basis for the confidentiality of Council records and proceedings, I.C. § 1-2103, and I.A.C.R. 32(d)(20), pass constitutional muster.

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B. The exclusion of Plaintiff from the records and proceedings of the Council did not violate Plaintiff's 14th Amendment right to procedural due process.

Procedural Due Process is the aspect of due process which relates to the characteristics of proceedings looking toward a deprivation of life, liberty or property. 16B Am. Jur.2d *Constitutional Law* § 902 (1998). No court has ever held that confidentiality provisions pertaining to a judicial council proceeding violated a complaining party's due process rights.

Petitioner is only a witness here. He is not a litigant or a party in the underlying case. Plaintiff does not have the same due process rights for example, as Chief Justice Trout, the subject of the complaint. As a witness, he has whatever rights might be granted a witness by statute or rule of the Council. It is Chief Justice Trout's liberty and property rights that are at stake at the Council's proceedings.

Plaintiff misunderstands this notion when he argues that he has property right consisting of his right to a fair adjudication and fair chance to prevail. But that property right is not at stake at the Council's proceedings regarding Chief Justice Trout's alleged conflict. The situation here is analogous to situations wherein a person files a complaint with Health and Welfare alleging food is stamp fraud or child abuse. Due process rights exist for the alleged perpetrator, but not for the person making the complaint. In fact, the complainants are often anonymous. Such a complainant is not entitled to be at the hearing or see the records. They're confidential by statute, just as the Council's records are privileged in the instant case.

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C. The exclusion of the public in general and Plaintiff in particular from the records and proceedings of the Council does not violate the public's nor Plaintiff's right to equal protection under the 14th Amendment.

Plaintiff cannot assert rights of the "public in general". He has no standing. Claims brought just allege real and definite personal rights.

The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws', which essentially mandates that all persons similarly situated be treated alike. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985). The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. Id. It is closely related to substantive due process, except with equal protection, the focus is on whether people similarly situated are receiving equal treatment by state action.

Plaintiff alleges that the state-created classification here does not pass the test. However, he mischaracterizes the classification. He argues that here the legislature gives a judge, **whose conduct is in question**, unfettered access to the hearing process and denies any access at all to a lawyer who has been affected by that conduct and has knowledge about it. He is mistaken as to the classification. It is not between a judge and a lawyer, like Plaintiff asserts, but rather, it is a classification between an accused and an accuser/ complainant. It is Chief Justice Trout's conduct and rights that are in question, not Plaintiff's. That is the classification.

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Knowing the classification made, the Court looks to see if the distinction bears some relevance to the purpose for which it was made. In other words, the Court looks to whether there is a rational relation to a legitimate government interest. Here, as outlined above in the Court's discussion of substantive due process, there are legitimate grounds for the confidentiality of the Council's records and proceedings. An accused judge, whose conduct is being examined, and whose rights are at stake, should be allowed access to the hearing and have access to the records of that hearing, as opposed to a complainant who has no rights directly at stake at that Council proceeding. The classification created is rationally related to those grounds and passes constitutional muster.

IV.

CONCLUSION

There is no genuine or material issue of fact for purposes of the pending Motion to Dismiss. I.C.A.R. 32(d)(20) is not unconstitutional, nor is I.C. § 1-2103. As such, Plaintiff has not stated a claim against Defendant upon which relief may be granted, and pursuant to I.R.C.P. 12(b)(6), it is HEREBY DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated this 18th day of February, 2000.

s/ Ronald J. Wilper
Ronald J. Wilper
DISTRICT JUDGE